

# Scarves, Slaves and the Nearly Headless NPD

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Maximilian Steinbeis Sa 21 Jan 2017

Dear Friends of Verfassungsblog,

Sir Nicholas de Mimsy-Porpington is a spectral character from the Harry Potter saga whose distinguishing mark is that his head is disconnected to his body but for an inch of skin and sinew, due to his botched beheading back in 1492, which is why he went by the moniker "Nearly Headless Nick" ever since. Poor Nick, although a ghost, is altogether of a distinctly benign disposition, very much unlike the German Neonazi party NPD. What both do have in common, though, is their state of incomplete decapitation: Last Tuesday, the Federal Constitutional Court decided that the NPD checks all the boxes required for its ban as unconstitutional but for a single, last and newly invented one. According to the [findings of the Court](#), the party is determined to abolish the very fundamentals of Germany's liberal and democratic constitutional order, but it lacks a new additional requirement which the Court calls "potentiality": The party is, after a number of defeats at state-level elections, in such miserable shape, both member- and moneywise, that it is simply incapable to pull through what it plans to do, therefore is not even potentially a constitutional threat right now and thus, for the time being, can not be banned.

Tuesday's momentous decision from Karlsruhe holds questions Germany as a liberal democracy has yet to find answers to, as I tried to point out in my [first reaction to the judgment](#): Usually, the state is not allowed to discriminate between parties when it comes to financial support, public venues for its rallies, air time in public radio and television and so forth: If it is the parties' constitutional job to help the sovereign form its political will, as Art. 21 of the German Grundgesetz provides, the state as object of that will has to abstain from any influencing and discriminating among them along the lines of political nicety or nastiness. All parties have to enjoy equal rights – unless and until they are banned. But does that hold also for a party as nearly-banned as the NPD? Up to which point does the state have to sit by and watch it pursue its officially unconstitutional aims with tied hands?

SVEN JÜRGENSEN in his [report from Karlsruhe](#) mentions some proposals how to solve this riddle, finding them unconvincing in the end. The Constitutional Court itself has openly called for a constitutional amendment. One [idea how to fix at least the problem of state funding for anti-constitutional parties](#) is brought forward by SABINE LEUTHEUSSER-SCHNARRENBARGER, a former liberal Federal Minister of Justice of spotless civil-rights credentials: introducing a second procedure before the Constitutional Court to deprive parties with unconstitutional aims and methods but without "potentiality" of their right to state funding.

## Deprivation of Freedom

The Strasbourg Court of Human Rights has also had a productive week: The Grand Chamber seems to have decided in *Hutchinson v. UK* that British lifers do not necessarily have to be granted that "right to hope" for their eventual release, after all. That right, proclaimed in *Vinter v. UK*, has caused much annoyance in the already greatly annoyed United Kingdom, and the Court might have preferred not to give cause to any further aggravation. The result though, as KANSTANTSIN DZEHTSIAROU notes with some concern, is that the Cour has [lowered the standards of human rights protection](#), and without giving convincing reasons, too.

Another not entirely convincing decision from Strasbourg was *J. et.al. v. Austria*, which cleared the Austrian authorities of the reproach of having failed to observe their duties under the prohibition of slavery and forced labor in Art. 4 ECHR. The plaintiffs were three Filipino chamber maids held in slave-like conditions by their Emirate masters. After they managed to escape during a mini-vacation of their holders in Vienna they found proper refuge in Austria but were denied the right to have their former holders prosecuted: A stay of only three days in Austria does, according to the Austrian Court, not amount to anything like slavery at all. The Strasbourg Court [lets it get away with that argument](#), which I find somewhat regrettable.

Greece, on the other hand, has to face harsh criticism for its insufficient legal provisions against torture. NIKOS SITAROPOULOS, deputy director at the CoE Human Rights Commissioner's office, [picks apart the Greek penal law provisions](#) and finds them lacking in several respects: Only "planned" acts of torture are deemed as such, which will not do under international law.

TATJANA HÖRNLE is picking up on last week's discussion on whether or not [Muslim judges and prosecutors should be allowed to wear the Hijab in court](#): Unlike Aqilah Sandhu in her post last week, Hörnle defends the "appearance of neutrality" of justice officials as a legitimate concern.

To get back to the role of political parties: LUKAS GASSER and MATTHIAS KRAATZ examine their right to [employ "social bots" in their campaigns](#) – pieces of software posting tweets and statements in social media and giving the appearance of real people supporting the respective party. Can this practice be in line with the role of parties to organize the will of the people? It can not, say Gasser and Kraatz and call for the legislator to intervene.

## Elsewhere

- MARK DAWSON and PIERRE THIELBÖRGER examine [Theresa May's "hardest of hard Brexits" speech](#), as do [ANTHONY SALAMONE](#), [KENNETH ARMSTRONG](#), [BENJAMIN MARTILL](#) and [STEVE PEERS](#),
- FABIO ALMURTADA sheds some light into the [legal situation of under-age wives of immigrants in Germany](#) and calls for a total ban of marriage under the age of 18, regardless of the couples' whereabouts,
- LORNA WOODS draws our attention to a decision by the Northern Irish Court of Appeals regarding the [liability of Facebook for the content of its sites](#),
- BIANCA SELEJAN-GUTAN reports on the [Romanian Parliamentary Elections](#) in December which brought the discredited Social Democrats back to power,
- JEAN-ERIC SCHOETTL analyzes the recent decisions by the French Conseil d'Etat on [Christmas crib installations in public buildings](#) under the principle of *laïcité*,
- MARKO MILANOVIC points to a set of "block buster" judgments by the UK Supreme Court regarding [state liability for wrongful acts in fighting international terrorism](#), and one of them – *Belhaj & Ramatullah v. Straw* – is examined in detail by NATASHA SIMONSEN and also by [DOMINIC RUCK KEENE](#),
- SANDY LEVINSON defends his call for a [new Constitutional Convention in the US](#) against the objection that a society as divided as the American might not be up to the task right now,
- ILYA SOMIN looks at the mixed constitutional legacy of President Obama, among them the "loaded gun" of [Presidentially started wars without Congressional authorization](#) he now has handed to his successor,
- on Just Security, KATERINA WRIGHT continues to chronicle on a day-to-day basis the [erosion of democratic traditions under President Trump](#).

Next week will be marked by the UK Supreme Court's *Miller* decision, of course. The German Federal Constitutional Court will hold a two-days hearing on a Federal law restrictions of mini-unions undermining uniform wage agreements. And the Strasbourg Court will hand down a possibly note-worthy Grand Chamber judgment regarding surrogate motherhood (*Paradiso and Campanelli v. Italy*).

As usual, any contributions on these cases or other topical matters constitutional are warmly welcome!

All best, and take care,

Max Steinbeis

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